

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 15 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0062-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
WADE DOUGLAS TACKETT, JR.,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20073734 and CR20084023 (Consolidated)

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins

Tucson
Attorneys for Petitioner

E S P I N O S A, Presiding Judge.

¶1 Pursuant to plea agreements, petitioner Wade Tackett, Jr., was convicted in CR20073734 of attempted burglary in the second degree and in CR20084023 of forgery. The trial court sentenced him to concurrent, presumptive prison terms of 2.5 years. Tackett sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming his

trial counsel had been ineffective at sentencing because he had not adequately investigated and presented evidence in mitigation at sentencing. The trial court denied relief without an evidentiary hearing. We will not disturb that ruling on review absent an abuse of discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). As discussed below, the trial court did not abuse its discretion.

¶2 In his Rule 32 petition, Tackett contended trial counsel failed to adequately investigate his mental health condition. He submitted in support of his petition Dr. Michael German's September 16, 2009, psychological evaluation, which contained information regarding Tackett's background that was not presented at sentencing, including the fact that his father had sexually assaulted his twin sister when she was fourteen years old. Tackett had been committed to a psychiatric hospital and had been on medication most of his life. German diagnosed Tackett as suffering from bipolar disorder with psychosis. Tackett asserted that counsel also had failed to gather and present other information regarding his abusive childhood.

¶3 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel's performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶4 In its minute entry order denying relief, the trial court found Tackett had failed to raise a colorable claim for relief. The court noted that some of the evidence in mitigation Tackett referred to in his petition for post-conviction relief had been before it at sentencing, and the record reflects trial counsel urged the court to impose mitigated prison terms. With respect to the new materials, the trial court found that, even accepting that information as true, the outcome at sentencing would have been no different. “This finding,” stated the court, “is based on the facts of each of the cases, the fact that the defendant committed the second offense while on release for the first (and absconder status) and his criminal history.”

¶5 Tackett has not sustained his burden on review of establishing the trial court abused its discretion by denying relief without an evidentiary hearing. Trial courts have broad sentencing discretion, and a reviewing court will not disturb a sentence that is within statutory parameters absent an abuse of that discretion. *See State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). A court abuses its discretion when its decision is arbitrary or capricious or when it fails to adequately investigate facts relevant to sentencing. *See State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978). In denying Tackett’s request for post-conviction relief, the court both acknowledged it had considered the evidence in mitigation that had been before it when it initially sentenced Tackett and reconsidered the propriety of the sentences in light of the new information Tackett had provided.

¶6 The trial court is vested with the discretion to determine whether mitigating circumstances exist and, if so, how much “weight to . . . give[] any factor asserted in

mitigation.” *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003). Tackett has not established the court abused its discretion here. Consequently, Tackett also has failed to establish the court abused its discretion when it found he had failed to raise a colorable claim of ineffective assistance of counsel, because he had not shown he had been prejudiced by counsel’s performance. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985) (if defendant fails to make sufficient showing on either prong of *Strickland* test court need not determine whether other prong satisfied).

¶7 We grant the petition for review but for the reasons stated herein, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly